Supreme Court, U.S.
FILED

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06-831 DEC 12 2006

No. _____ OFFICE OF THE CLERK

In the Supreme Court of the United States October Term 2006

♦

FLORA B. CADIZ,

Petitioner,

vs.

THE BANK OF NEW YORK, TRUSTEE, of Amresco Residential Mortgage Securities Corporation Mortgage Loan Trust 1997-3,

Respondent.

♦

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

♦

PETITION FOR WRIT OF CERTIORARI

♦

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QUESTIONS PRESENTED

1

Has Congress granted federal bankruptcy courts subject matter jurisdiction pursuant to Section 350(b) of Title 11 of the United States Code to reopen bankruptcy cases which have been dismissed and thus terminated pursuant to Section 349 of Title 11 of the United States Code that have never been successfully administered and thus never completed and thereby never closed?

2

If so, has Congress unconstitutionally enlarged its Article I power and impermissibly intruded upon the separation of powers in granting federal bankruptcy courts subject matter jurisdiction pursuant to Section 350(b) of Title 11 of the United States Code to reopen bankruptcy cases which have been dismissed and thus terminated pursuant to Section 349 of Title 11 of the United States Code that have never been successfully administered and thus never completed and thereby never closed?

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I. JURISDICTIONAL STATEMENT

The federal question jurisdiction of the bankruptcy court below was based upon Sections 349 and 350(b) of Title 11 of the United States Code.

The jurisdiction of the bankruptcy appellate panel below was based upon Section 158(d) of Title 28 of the United States Code and Rule 6(b) of the Federal Rules of Appellate Procedure.

This Court has jurisdiction to review this Petition, timely filed on December 12, 2006, within ninety days of the denial of rehearing by the bankruptcy appellate panel on September 13, 2006, pursuant to Section 1254(1) of Title 28 of the United States Code and Supreme Court Rules 10(a), 13.3, and 29.4(b). Section 2403(b) of Title 28 may apply.

II. AUTHORITATIVE PROVISIONS

The challenged decisions of the bankruptcy court, the bankruptcy appellate panel, and the court of appeals are set forth in the Appendix, and the text of Sections 349 and 350(b) of Title 11 of the United States Code are set forth in the Petition.

III. STATEMENT OF THE CASE

Petitioner ("Cadiz") filed a *pro se* Chapter 13 Petition on July 15, 2002 (which was her third filing), following her having *successfully* obtained a Chapter 7 discharge from the same bankruptcy court earlier on May 25, 1999, in Case No. 99-00321, this time admittedly seeking to prevent a state court summary judgment foreclosure proceeding from going forward, which was scheduled for hearing two days later on July 17, 2002.

Respondent ("BONY"), however, went forward with the summary judgment hearing in state court claiming that it had no knowledge, at the time, of her filing (although it is undisputed that its counsel did learn of the filing at least a few days later), even though, relying understandably upon her bankruptcy filing, intending to present a Chapter 13 Plan to the Bankruptcy Court, Cadiz neither filed opposition

papers no appeared at the July 17, 2002, hearing, and the state court orally granted a decree of foreclosure since BONY's motion for summary judgment as a result was not contested in state court by Cadiz.

At first, upon learning of Cadiz's Chapter 13 filing, its counsel, three weeks thereafter on August 7, 2002, filed a "Notice of Bankruptcy Petition (Case No. 02-02558)" in the state court foreclosure action, and Cadiz, without counsel, believing that her bankruptcy filing was moot since the state court had already gone ahead anyway to foreclose on her residence, understandably distraught, did not file her schedules or appear at her creditor's meeting, as a result of which her Chapter 13 Case was dismissed on September 23, 2002.

On September 29, 2002, BONY's counsel filed a "Notice of Bankruptcy Court's Order Dismissing Case" in state court, and on November 8, 2002, recognizing that it had violated the automatic stay, even if unintentionally, BONY at first responsibly filed an amended notice of hearing of its summary judgment motion in state court, reset by it for another hearing on November 27, 2002, since the state court had not yet entered a written order based upon the hearing that occurred in violation of the automatic stay.

However, unilaterally doing a complete about-face, BONY, two days before the November 27, 2002, hearing, on November 25, 2002, abruptly withdrew its amended notice of hearing, having become aware that Cadiz had and was prepared to assert a clear defense to its summary judgment motion after she had secured undersigned defense counsel in the state foreclosure case, and instead, adroitly waiting more than four months until settlement negotiations proved unsuccessful, ran back -- in complete bad faith -- into the bankruptcy court with two motions (1) to reopen the case and (2) to annul the automatic stay, in order to defeat Cadiz's otherwise valid state court federal TILA defenses.

Earlier, Cadiz and her family had refinanced their Honolulu residence on July 1, 1997, in the amount of $400,000 with Amresco Residential Mortgage Corporation,

which mortgage was immediately assigned to BONY.

On October 22, 1998, BONY filed a foreclosure action in the First Circuit Court of the State of Hawaii, alleging nonpayment and seeking to sell the property at public auction.

Cadiz and her family members, also named as defendants in the state court foreclosure suit, answered BONY's complaint on November 17, 1998, citing several federal TILA violations as a defense, that same day sending BONY a formal, timely written cancellation notice pursuant to federal law, voiding the mortgage and withdrawing from state court any mortgage foreclosure enforcement jurisdiction under the Supremacy Clause.

As a matter of settled federal law and well-recognized evidentiary requirements, Cadiz' answer and cancellation letter rendered summary judgment for BONY legally impossible – but for BONY's one-year-old, belated bankruptcy court reopening strategy to defeat Cadiz's federal TILA rights.

The bankruptcy court nevertheless granted both motions solely on the basis, as self-servingly argued by BONY, that Cadiz's filing was "in bad faith" as "she didn't file schedules, didn't show up at the first meeting of creditors. All the indications are that she filed only to get the advantage of the automatic stay," without the bankruptcy court considering all of the factors and all of the circumstances, or weighing any of the equities or the clear prejudice on her side.

Whereupon, BONY on June 12, 2003, filed in state court a "Notice of Bankruptcy Court's Order Granting Motion To Annul Automatic Stay," and proceeded to procure from the state court a written foreclosure order and foreclosure judgment, which were entered on July 8, 2003, but in apparent recognition that it had been in the wrong, awaiting the outcome of Cadiz's appeal to the bankruptcy appellate panel ("BAP"), following the filing of Cadiz's "Notice of Appeal there," BONY proceeded no further in

state court, the last activity in the state court foreclosure case at that juncture having been its August 1, 2003, "Motion To Sell Without Open Houses," subsequently granted.

Following the filing of Cadiz's BAP appeal, first the BAP Clerk held that the re-opening was no longer appealable as a previous final order not appealed in time, then second BAP overruled the Clerk, but nevertheless held that Cadiz had no standing to challenge the reopening, denying even any briefing of that jurisdictional issue, which Petitioner briefed anyway, leaving for decision only whether the stay's annulment was an abuse of discretion, which BAP then held it was not.

Cadiz further appealed to the court of appeals, with her merits panel subsequently affirming on the basis that "the Bankruptcy Court had jurisdiction to reopen the proceedings and consider the motion to retroactively annul the stay because the court was not granting new relief, but rather was simply interpreting and effectuating its prior order."

IV. LEGAL ARGUMENT

Section 350(b) of Title 11 of the United States Code, entitled "closing and reopening cases," provides that "(a) after an estate is fully administered and the court has discharged the trustee, the court shall close the case; (b) a case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause."

According to an earlier decision of the ninth circuit court of appeals which earlier definitively interpreted Section 350(b), Income Property Builders, Inc. v. Lomas & Nettleton Co., 699 F.2d 963. 965 (9th Cir. 1982), Section 350(b) is not applicable to cases which have been dismissed and never successfully completed and thereby never closed, (holding that Section 349 is the applicable provision regarding the effect of a dismissal):

> [A] bankruptcy is normally closed after the bankruptcy proceedings are completed. At that time the debts of the bankrupt are usually discharged and the proceeds of debtor's nonexempt assets divided among creditors. A bankruptcy is reopened under 11 U.S. C. 350(b), not to restore the prebankruptcy status, but to continue the bankruptcy proceeding. The word "reopened" used in Section 350(b) obviously relates to the word "closed" used in the same section [referring to Section 350(a)]. In our opinion a case cannot be reopened unless it has been closed. An order dismissing a bankruptcy case accomplishes a completely different result than an order closing it would and is not an order closing.

That decision, made by a prior ninth circuit panel, had never been overruled *en banc*. "A three-judge panel of this court cannot disregard or overrule a prior decision of this court," United States v. Salas, 879 F.2d 530, 537 (9th Cir.), *cert. denied*, 493 U.S. 979 (1989).

Decisions in bankruptcy courts in other circuits, moreover, have adhered to that statutory interpretation and were fully in accord; see, *e.g.*, Critical Care Support Services v. United States, 236 B.R. 137 (E.D. N.Y. 1999) (Section 350 held inapplicable to dismissed case); In re Woodhaven, Ltd., 139 B.R. 745 (N.D. Ala. 1992) (attempt to reopen dismissed case denied).

BAP similarly had lacked the authority to disregard that previous panel's precedent.

Nevertheless, BAP's similarly disregarded the ninth circuit's earlier decision in Income Property Builders, boot-strapping its decision in Cadiz upon its earlier BAP decision in Aheong v. BONY, 276 B.R. 223 (9th Cir. BAP 2002) (which decision was never further appealed due to an amicable settlement and voluntary dismissal of Aheong's appeal to the court of appeals), upon which sole basis BAP

here refused to even hear Cadiz's jurisdictional issue.

BAP's earlier split decision in Aheong itself was conflicted with respect to the actual claimed basis for exercising such broad power, Northern Pipeline Construction Co. v. Marathon Pipe Line Company, 458 U.S. 50 (1982), representing a clear usurpation of Article III judicial power not granted bankruptcy courts by Congress, and expressly contrary to the "effect of dismissal" set forth by Congress in Section 349 of Title 11 of the United States Code:

> (a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.
> (b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title—
>
> (1) reinstates--
> (A) any proceeding or custodianship superseded under section 543 of this title;
> (B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and
> (C) any lien voided under section 506(d) of this title;
> (2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and
> (3) retests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

Most importantly, Cadiz's court of appeals panel, in effect, chose to ignore Income Property Builders altogether, claiming reliance on two other cases instead: "*See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379-80 (1994); *see also In re Taylor*, 884 F.2d 478, 481 (9th Cir. 1989).

Neither Kokkonen nor Taylor actually supports such *sub silencio* overruling of Income Property Builders.

The facts in Kokkonen have no similarly to this case, this Court in Kokkonen in fact explicitly rejecting the extension of jurisdiction by district courts based on such vague notions of ancillary enforcement powers over dismissed cases, where enforcement of settlement terms was not reserved, adhering to the constitution principle that "federal courts are courts of limited jurisdiction," 511 U.S. at 377, applicable more so to Article I bankruptcy courts.

If anything, the decision of this Court in Kokkonen actually supports the holding of the prior circuit court panel in Income Property Builders, and directly conflicts with the decisions of the bankruptcy court, BAP, and the court of appeals below.

Similarly, the decision in Taylor, *supra*, actually flatly contradicts Cadiz's merits panel's reasoning, for in Taylor, 884 F.2d at 481, that prior panel expressly upheld the earlier panel's decision in Income Property Builders, finding no subject matter jurisdiction for granting relief from a stay in a dismissed case:

> Under the law of this circuit, the bankruptcy court retains subject matter jurisdiction to *interpret* orders entered prior to dismissal of the underlying bankruptcy case, *Beneficial Trust Deeds v. Franklin (In re Franklin)*, 802 F.2d 324, 326-27 (9th Cir.1986), and to dispose of ancillary matters such as an application for an award of attorney's fees for services rendered in connection with the underlying action, *see USA Motel Corp. v.*

> *Danning*, 521 F.2d 117 (9th Cir.1975). The bankruptcy court does not have jurisdiction, however, to grant new relief independent of its prior rulings once the underlying action has been dismissed. *See Armel Laminates, Inc. v. Lomas & Nettleton Co. (In re Income Property Builders, Inc.)*, 699 F.2d 963, 964 (9th Cir.1982). *See al o Spacek v. Thomen (In re Universal Farming Industries)*, 873 F.2d 1334, 1335 (9th Cir. 1989) (dismissal of underlying bankruptcy case moots all issues directly involving the debtor's reorganization, but not those ancillary to the bankruptcy). In this case, the bankruptcy court lacked subject matter jurisdiction to render a valid judgment granting . . . relief from the stay that arose upon filing of Taylor's first bankruptcy petition, because Judge Russell did not enter his "default judgment" . . . until after . . . the underlying bankruptcy petition had been dismissed . . . .

The crucial distinction overlooked by the court of appeals' panel is that the automatic stay is created by operation of law, and not by an order of the bankruptcy court.

Even in bankruptcy cases which have been fully administered and closed, unlike here, a creditor is not allowed to "reopen" a dismissed case under Section 350, as here, years after dismissal, after it had actual notice and knowledge of the automatic stay and its Section 362 violation, especially considering that it has the burden of proof, In re Brooks, 200 F. Supp. 497 (N.D. Ohio 1962) (burden is on moving party to demonstrate grounds for Section 350 reopening) – such delay constituting a gross form of laches, not entitling a bankruptcy creditor to the type of Section 350 extraordinary relief as was granted and affirmed here.

See, *e.g.*, decisions in other bankruptcy cases which have been fully administered and closed, unlike here, In re Bianucci, 4 F.3d 526 (7th Cir. 1993) (reopening denied two years after case was closed where motion delayed for 5-month period); Virgin Islands Bureau of Internal Revenue v. St. Croix Hotel Corp., 60 B.R. 412 (D.C. VI), *affirmed*, 867 F.2d 169 (3rd Cir. 1986) (reopening denied after delaying filing of the motion for 26 months); In re Frontier Enterprises, Inc. (70 B.R. 356 (C.D. Ill. 1987) (holding lapse of time must be given great weight before reopening will be permitted), see also In re Pagan, 59 B.R. 394, 397 (D. P.R. 1986):

> We note that equity assists the vigilant and diligent, not those who sleep on their rights. Appellants' actions after receiving notice of the bankruptcy constitute dilatory behavior under the circumstances. . . . We find that having delayed so long their [Section 350] claim is barred by laches.

And, even where such cases have been, unlike here, first properly administered and closed, federal courts have nevertheless recognized that any attempts at reopening, even in such apparently legitimate Section 350 cases, raise serious constitutional questions, never before addressed by this Court, which can only be answered by this Court, whether such intrusion upon the separation of powers between Congress and the Courts is constitutional, In re Ford, 188 B.R. 523, 525 (E.D. Pa. 1995):

> We would point out, however, that efforts to invoke bankruptcy jurisdiction after a case is closed, or even as to property of the estate of a pending case after stay relief as to that property has been granted, must be viewed, at some point, as improperly extending bankruptcy jurisdiction beyond its intended scope.

Moreover, while it is true that Cadiz filed three bankruptcy petitions, not only did the first result in a

successful Chapter 7 with a discharge, but, secondly, she only "abandoned" the third, Chapter 13 filing as a result of BONY's steaming ahead with the state court summary judgment foreclosure proceedings nevertheless, which additional Chapter 13 filing this Court earlier gave her an absolute right to file, Johnson v. Home State Bank, 501 U.S. 78, 87 (1991) ("Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization to a debtor who previously has filed for Chapter 7 relief").

V. CONCLUSION

The increasingly unilateral enlargement of Section 350(b) subject matter jurisdiction by bankruptcy courts, *sua sponte*, to permit the reopening of dismissed bankruptcy cases that have not been fully administered or closed has reached epidemic proportions today.

It is submitted that such uncontrolled expansion, in effect, of Article I "judicial power" is not only contrary to the intention of Congress, but represents a serious breach of the Constitution's separation of powers.

Such growing constitutionally impermissible exercise of federal Article III subject matter jurisdiction by bankruptcy courts is clearly seen, for instance, in another recent case in the same bankruptcy court which decided the Cadiz case, In re Cabuloy, Sr., Case No. 00-02546 (Bk. D. Hawaii).

The Cabuloy case is presently on appeal to the United States District Court for the District of Hawaii, renamed Burcena v. Bank One, Civil No. 06-00422 HG, of which this Court should take judicial notice -- the files in which merit the close scrutiny of this Court in conjunction with its review of this Petition.

In Cabuloy, another dismissed bankruptcy case never fully administered and never closed, the creditor there waited six years before deciding to reopen the case to annul the automatic stay when state court foreclosure proceedings were not favorable to it, serving its reopening motion by mail sent to the last known address of the Debtor who had died

four years before.

The bankruptcy court in Cabuloy saw nothing wrong with serving a deceased Debtor by mail six years later and reopened the case and annulled the automatic stay to the disadvantage of the deceased Debtor's relatives who were opposing a related state court foreclosure (The Court: "it sounds a little bizarre, but it's the Debtor's obligation to keep the Court informed of how he is to be contacted.").

The court of appeals saw nothing wrong in serving a deceased Debtor by mail and recently refused emergency review in Case No. 06-16765 (2006).

Such a reading of Section 350(b) not only contradicts the statutory language in Section 349 and common sense, but represents the type of growing constitutional attack upon the Constitution's separation of powers that only this Court can, should, and urgently must correct.

Respectfully submitted,

GARY VICTOR DUBIN
Attorney for Petitioner

Honolulu, Hawaii
December 12, 2006[1]

[1] There was a second issue on appeal to the court of appeals with respect to the fairness of the annulment of the automatic stay once Cadiz's bankruptcy case was reopened, on the assumption that the bankruptcy court had such subject matter jurisdiction, which second issue however appears too fact intensive to present here.

However, for the record Cadiz was clearly prejudiced by the reopening *and annulment* since summary judgment was granted at a state court hearing at which she neither appeared nor contested summary judgment while representing herself, understandably relying upon the

protection afforded to her by the automatic stay, the retroactive annulment of which was clearly manifestly unjust in such circumstances, yet the bankruptcy court nor BAP nor the court of appeal's panel considered a single equitable factor in favor of Cadiz.

For instance, with respect to BAP's emphasis on the conduct of Cadiz' family members in also filing petitions, there can be no more fundamental a principle of American justice than one cannot be punished for the acts of another without some evidentiary showing of complicity.

Yet that is precisely what BAP did, faulting Cadiz for six other prior bankruptcy filings that were not even hers.

Such reasoning clearly offends the most basic notions of due process of law, which in a somewhat similar context, by analogy, led one bankruptcy judge to conclude, where a creditor was attempting to affect the property rights of others not parties to a bankruptcy proceeding, that such application of a bankruptcy court's earlier "in rem" order as to one not a party there in such circumstances would clearly be an egregious violation of fundamental due process rights, Great Western Bank v. Snow, 201 B.R. 968, 971 (Bk. C.D. Calif. 1996):

> Due process considerations, however, prohibit the issuance of an order binding the co-owners: the court has no jurisdiction over them, since they have not been brought before the Court.

The reverse, as here, should also be true.

The conduct of others should not prejudice the rights of Cadiz. See also, *e.g.*, In re Cherokee New York Investments, 1995 WL 548182 (Bk. E.D.N.Y. 1995).

Moreover, in Fjeldsted v. Lien, 293 B.R. 12, 25 (9th Cir. BAP 2003) at least 12 factors were identified to be

considered in annulment decisions, only the first two of which were even tangentially mentioned either by the bankruptcy court or by BAP below, and only the first of which was mentioned by the court of appeals panel:

> We suggest the following factors to consider when deciding whether to annul the stay: 1. Number of filings; 2. Whether, in a repeat filing case, the circumstances indicate an intention to delay and hinder creditors; 3. A weighing of the extent of prejudice to creditors or third parties if the stay relief is not made retroactive, including whether harm exists to a bona fide purchaser; 4. The Debtor's overall good faith (totality of circumstances test): *cf. Fid. & Cas. Co. of N.Y. v. Warren (In re Warren)*, 89 B.R. 87, 93 (9th Cir. BAP 1988)(chapter 13 good faith); 5. Whether creditors knew of stay but nonetheless took action, thus compounding the problem; 6. Whether the debtor has complied, and is otherwise complying, with the Bankruptcy Code and Rules; 7. The relative ease of restoring parties to the *status quo ante;* 8. The costs of annulment to debtors and creditors; 9. How quickly creditors moved for annulment, or how quickly debtors moved to set aside the sale or violative conduct; 10. Whether, after learning of the bankruptcy, creditors proceeded to take steps in continued violation of the stay, or whether they moved expeditiously to gain relief; 11. Whether annulment of the stay will cause irreparable injury to the debtor; 12. Whether stay relief will promote judicial economy or other efficiencies.

While it is true that Cadiz, first of all, filed three bankruptcy petitions, not only did the first result in a

successful Chapter 7 with a discharge, but, secondly, she only "abandoned" the third, Chapter 13 filing, as a result of BONY's going ahead with the foreclosure proceedings.

Yet, only the first Fjeldsted ground was mentioned by the court of appeals' panel, with no attention paid, moreover, whatsoever by the Bankruptcy Court or by BAP or by the court of appeals' panel to the fact that at the time of her 2002 filing and during BONY's foreclosure case, Cadiz was appearing *pro se*, that she otherwise would suffer irreparable injury being prevented from asserting her TILA defenses, whereas there would be no prejudice to BONY by having required that it follow through on its own post-dismissal, amended noticing of the hearing of its summary judgment motion in state court.

The absence of counsel, it is important to note, has been held to be an important balancing factor in deciding stay annulments for abuse of discretion, National Environmental Waste Corp. v. City of Riverside, 129 F.3d 1052, 1055 (9th Cir. 1997), *cert. denied*, 524 U.S. 952 (1998) -- a case ironically – the *only case* regarding the weighing of equitable factors – cited by the court of appeals' panel in affirming BAP and the bankruptcy court.

A result favoring Cadiz would clearly have been in accord, furthermore, with the more recent BAP decision, for instance, in Stinson v. Bi-Rite Restaurant Supply, Inc., 295 B.R. 109, 116-118 (9th Cir. BAP 2003), balancing the equities, where, even though the debtor there had failed to attend two creditors' meetings in his third bankruptcy, a Chapter 13 case, as here, the creditor was held to have had "clear notice of the Debtor's bankruptcy," as here, yet nevertheless went ahead, following through with the state court action after full notice, however belatedly, of the automatic stay, also as here.

Equally compelling is the recent decision of the United States Bankruptcy Court for the Northern District of Georgia in Ford v. Loftin, 296 B.R. 537, 556-557 (Bk. N.D.

Ga. 2003), which in major part relied on the reasoning of BAP in Fjeldsted, *supra*, refusing to annul an automatic stay even after sale to a third party and even after title transfer no less, balancing equities not dissimilar from those here given the right of Cadiz to a clear TILA rescission remedy in a state court action in which a summary judgment order had only recently been entered and no preliminary auction sale had even yet been scheduled or had taken place.

Moreover, a motion to reopen a dismissed case is in effect a motion to set aside a prior dismissal order, and hence is also governed by the "strict limitations" of Rule 60(b) of the Federal Rules of Civil Procedure through the application of Bankruptcy Rule 9024, requiring a showing of "exceptional circumstances," another test that BONY failed to satisfy here, and a standard that BAP virtually ignored in matter-of-factly affirming the annulling the automatic stay in Cadiz' case, Critical Case, *supra*, 236 B.R. at 140-142.

The automatic stay, finally, is not something to be so gingerly annulled at the whim of a dilatory creditor. As Chief Judge Mannes explained in denying reopening in In re Lampkin, 116 B.R. 450, 452 (Md. 1990), for instance, in a similar factual context as that found here:

> [T]he automatic stay . . . [is] a bedrock policy upon which the Code is built and a fundamental debtor protection of the bankruptcy law. . . . The stay is the ship upon which debtors embark on their fresh start. To ensure the stay has not been knowingly or carelessly violated, the court will require a showing that good cause exists for the annulment of the stay under Section 362(d). Although this may punish innocent parties, the Code allows no other solution. The cost is relatively small . . . . To rule otherwise rewards violation of the stay.

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1. Order Reopening Case, Filed March 11, 2003, In The United States Bankruptcy Court For The District Of Hawaii

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF HAWAII

In re:	)	CASE NO. 02-02558
	)	(Chapter 13)
FLORA B. CADIZ,	)	
	)	ORDER REOPENING
Debtor.	)	CASE
	)	
	)	(Non Hearing)
	)	Judge: Honorable
	)	Robert J. Faris
	)	

ORDER REOPENING CASE

The Court having duly considered the Motion to Reopen Case filed herein on March 6, 2003 by the Bank of New York, as Trustee of Amresco Residential Securities Corporation Mortgage Loan Trust 1997-3 under the Pooling and Servicing Agreement Dated as of September 1, 1997, and further finding good cause, hereby grants the Motion to Reopen Case. The case is hereby reopened for the limited purpose only of considering the said Motion to Annul Automatic Stay and Codebtor Stay and shall remain open until the entry of an order respecting said motion.

Dated: Honolulu, Hawaii; March 11, 2003.

/s/ Lloyd King

HONORABLE LLOYD KING
United States Bankruptcy Judge

2. Order Granting Motion To Annul Automatic Stay And Codebtor Stay, Filed June 3, 2003, In The United States Bankruptcy Court For The District Of Hawaii

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF HAWAII

In re:	) CASE NO. 02-02558
	) (Chapter 13)
FLORA B. CADIZ,	)
	) ORDER GRANTING
Debtor.	) MOTION TO ANNUL
	) AUTOMATIC STAY
	) AND CODEBTOR
	) STAY
	)
	) DATE: May 12, 2003
	) TIME: 9:30 a.m.
	) JUDGE: Honorable
	) Robert J. Faris
	)

ORDER GRANTING MOTION TO ANNUL AUTOMATIC STAY AND CODEBTOR STAY

The Motion to Annul Automatic Stay and Codebtor Stay, filed on March 12, 2003 by The Bank of New York, as Trustee of Amresco Residential Securities Corporation Mortgage Loan Trust 1997-3 under the Pooling and Servicing Agreement Dated as of September 1, 1997 ("Bank of New York"), duly came on for a final hearing on May 12, 2003 before the Honorable Robert J. Faris, presiding United States Bankruptcy Judge. Russell K. L. Leu, Esq. appeared on behalf of Movant; Gary Victor Dubin, Esq. appeared on behalf of Flora B. Cadiz, above-named debtor (the "Debtor").

The Court having found due notice given and further having duly considered the Motion, memoranda, declarations

and exhibits, in support and opposition thereof, the files, pleadings and record herein, and further having oral argument of counsel, and for the reasons stated in open court pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure, does hereby find good cause and grants the Motion to Annul the Automatic Stay and Codebtor Stay, and IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1.The Automatic Stay imposed by 11 U.S.C. 5 362 and the Codebtor Stay imposed by 11 U.S.C. § 1301, as it applies to The Bank of New York, as Trustee of Amresco Residential Securities Corporation Mortgage Loan Trust 1997-3 under the Pooling and Servicing Agreement Dated as of September 1, 1997 ("Bank of New York"), with respect to the Debtor Flora B. Cadiz (the "Debtor"), Debtor's estate, the certain real property situated at and described as 94-276 Pupukoae Street, Waipahu, Hawaii 96797, and bearing Tax Map Key No. 9-4-027-066(1) ("Property") and that certain foreclosure action pending as, The Bank of New York, as Trustee of Amresco Residential Securities Corporation Mortgage Loan Trust 1997-3 under the Pooling and Servicing Agreement Dated as of September 1, 1997, Plaintiff, vs. Rafael Turcato Belardo, Evarista Turcato Belardo, Arsenio Queja Cadiz, Flora Belardo Cadiz, Fe Leonora Turcato Belardo, First Trust National Association, as Trustee, et. al., Civil No. 98- 45710-10, Circuit Court of the First Circuit, State of Hawaii (the "Foreclosure Action"), is hereby ordered annulled effective as of July 15, 2002.

2. Bank of New York, as Trustee of Amresco Residential Securities Corporation Mortgage Loan Trust 1997-3 under the Pooling and Servicing Agreement Dated as of September 1, 1997, its servicing agent, any other of its agents, employees, attorneys and the duly-appointed foreclosure commissioner shall be entitled to pursue its available remedies, including among other, continuation with and concluding the Foreclosure Action against the Debtor, Codebtors and the Property, recover possession over the Property, sell said Property and recover payment of its

secured claim from the sale of said property.

3. There shall be no deficiency judgment against the Debtor, Pursuant to the Discharge entered on May 25, 1999 in Case No. 99-00321 and attached as Exhibit "A".

4.There shall be a ten-day stay from the date of the entry of this order pursuant to Rule 4001 of the Federal Rules of Bankruptcy Procedures.

Dated: Honolulu, Hawaii; June 3, 2003.

/s/ Robert J. Faris

HONORABLE ROBERT J. FARIS
United States Bankruptcy Judge

3. Clerk's Order, Filed August 1, 2003, In The United States Bankruptcy Appellate Panel Of The Ninth Circuit

IN THE UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re:	) BAP No. HI-03-1322
	) BK. No. 02-02558
FLORA B. CADIZ,	)
	) CLERK'S ORDER
Debtor.	)
	)
FLORA B. CADIZ,	)
	)
Appellant,	)
	)
v.	)
	)
THE BANK OF NEW YORK,	)
	)
Appellee.	)

CLERK'S ORDER

This appellate file has been administratively reviewed. In the notice of appeal filed June 13, 2003, appellant lists two orders to be appealed: 1) order reopening case, entered March 11, 2003; and 2) order annulling the automatic stay, entered June 3, 2003.

Pursuant to Federal Rule of Bankruptcy Procedure 8002 (a), a notice of appeal must be filed within 10 days of the date of the entry of the judgment, order, or decree appealed from. A timely filed notice of appeal is mandatory and jurisdictional. Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978) ; In re Slimick, 928 F.2d 304, 306 (9th Cir. 1990). The notice of appeal filed June 13, 2003, is not timely to appeal the order reopening the bankruptcy case entered March 11, 2003.

Therefore, it is hereby ORDERED that appellate review in this appeal will be limited to a review of the order annulling the automatic stay entered on June 3, 2003.

Any party may file an objection and request for judicial review of this clerk's order within TEN (10) DAYS.

FOR THE PANEL,

/s/ Nancy B. Dickerson

NANCY B. DICKERSON
Clerk of Court

4. Order, Filed October 15, 2003, In The United States Bankruptcy Appellate Panel Of The Ninth Circuit

IN THE UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re:	)	BAP No. HI-03-1322
	)	BK. No. 02-02558
FLORA B. CADIZ,	)	
	)	ORDER
Debtor.	)	
_____	)	
	)	
FLORA B. CADIZ,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
THE BANK OF NEW YORK,	)	
	)	
Appellee.	)	
_____	)	

Before: MONTALI, RYAN and PERRIS, Bankruptcy Judges.

The Panel has received and considered appellant's response to the clerk's order issued August 1, 2003, limiting the appellate review in this appeal to the order annulling the automatic stay.[1] The BAP clerk's order suggested that the notice of appeal was untimely as to the order reopening the case. Appellant has moved to set aside the clerk's order.

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[1] Appellant did not file her response within ten days as directed by the clerk's order. We will excuse the late filing and consider the response.

Appellant is correct that the reopening order was interlocutory. An appeal from a non-final order still must be filed within the Fed. R. Bankr. P. 8002 deadlines. 28 U.S.C. § 158(c) (2); Baldwin v. Redwood City, 540 F.2d 1360, 1364 (9th Cir. 1976) (holding that the appellant could not pursue an interlocutory appeal because it was untimely, but that interlocutory order would merge into the final judgment and could be challenged upon timely appeal from the final judgment). Appellant contends that the order reopening the bankruptcy case is now final, having merged with a final judgment (the order annulling the automatic stay). However, it is not clear that the order annulling the automatic stay closed the bankruptcy case and thereby rendered the reopening order final. Although the order reopening the case said that the case would remain open "until" entry of an order disposing of the motion to annul the stay, it did not say the case would automatically be closed thereafter. In fact, the case remains open because of the pendency of this appeal.

Ultimately, whether or not the notice of appeal is timely as to the reopening order is irrelevant because appellant lacks standing under Ninth Circuit Bankruptcy Appellate Panel precedent to appeal the reopening order.

The bankruptcy court's jurisdiction to determine the motion to annul the automatic stay did not depend upon reopening the underlying bankruptcy case. Therefore, appellant was not aggrieved by the reopening order and has no standing to appeal it. Aheong v. Mellon Mortgage Company (In re Aheong), 276 B.R. 233, 236-250 (9th Cir . BAP 2002).

Therefore, appellant's motion to set aside the clerk's order is ORDERED DENIED.

5. Memorandum, Filed March 29, 2004, In The United States Bankruptcy Appellate Panel Of The Ninth Circuit

IN THE UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re:	)	BAP No. HI-03-1322
	)	BK. No. 02-02558
FLORA B. CADIZ,	)	
	)	MEMORANDUM*
Debtor.	)	
	)	
	)	
FLORA B. CADIZ,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
THE BANK OF NEW YORK,	)	
	)	
Appellee.	)	
	)	

Argued by Telephone Conference and Submitted on March 18, 2004 at Pasadena, California

Filed – March 29, 2004

Appeal from the United States Bankruptcy Court for the District of Hawaii

Honorable Robert J. Faris, Bankruptcy Judge, Presiding Before: KLEIN, MONTALI, and SMITH, Bankruptcy Judges.

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*This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

The bankruptcy court entered an order retroactively annulling an automatic stay. Debtor, Flora Belardo Cadiz ("Cadiz"), contends that the bankruptcy court did not engage in a thorough-enough analysis when determining whether "cause" existed under 11 U.S.C. § 362 (d) to annul the stay. Because the bankruptcy court made several factual findings of bad faith that weigh heavily in favor of appellee under the prevailing "balancing of the equities" test, the court did not abuse its discretion in annulling the automatic stay. AFFIRMED.

FACTS

Cadiz filed the instant chapter 13 bankruptcy petition on July 15, 2002. Appellee, Bank of New York ("BONY") was the only creditor listed by Cadiz in her petition. Cadiz filed no schedules and did not appear at the § 341 meeting of creditors. The subject bankruptcy was the third filing by Cadiz personally and the ninth filing in three and a half years by Cadiz and her family members, Rafael Turcato Belardo, Arsenio Cadiz, Fe Leonora Turcato Belardo, and Evarista Turcato Belardo (collectively the "co-debtors").[2] With the

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	Debtor	Case No.	Date of Filing	Disposition
1.	Flora Cadiz	99-00321	1/26/99	Discharge entered on 5/25/99
2.	Arsenio Cadiz	99-04561	10/29/99	Order dismissing case with prejudice and barring refilling for 180 days entered on 3/28/00

3.	Rafael Belardo	00-00253	1/26/00	Order dismissing case with prejudice and barring refilling for 240 days entered on 2/17/00
4.	Arsenio Cadiz	00-01074	3/23/00	Order dismissing case with prejudice and barring refilling for 240 days entered on 5/19/00
5.	Flora Cadiz	00-04260	12/11/00	Order dismissing case and setting 180 day bar to new filing entered on 2/1/01
6.	Evarista Belardo	01-02357	6/12/01	Order dismissing case and setting 180 day bar to new filing for failure to file required documents entered on 7/9/01

exception of Cadiz's first bankruptcy filing in January 1999, all the bankruptcy cases were dismissed.

BONY is the mortgage holder of Cadiz's and co-debtors Honolulu residence. BONY first filed a foreclosure complaint in state court on October 22, 1998, when Cadiz and co-debtors were in default of their payments owed to BONY. BONY subsequently moved for summary judgment and an interlocutory decree of foreclosure against Cadiz and co-debtors in state court on October 6, 1999, which was set for a hearing on November 1, 1999. A few days before the hearing, Arsenio Cadiz filed a chapter 13 bankruptcy petition. That filing was the first in a series of bankruptcy filings by Cadiz and co-debtors that stayed a hearing on the motion.

7.	Arsenio Cadiz	01-03924	10/9/01	Order dismissing case and setting 240 day bar to new filing entered 1/17/02
8.	Evarista Belardo	02-01672	4/30/02	Order dismissing case and setting 180 day bar to new filing for failure to file required documents entered 5/20/02
9.	Flora Cadiz	02-02558	7/15/02	Instant appeal

On July 17, 2002, having no notice of Cadiz's instant bankruptcy petition filed on July 15, 2002, BONY went forward with the summary judgment hearing. Cadiz did not file an opposition to the motion and did not appear at the hearing. The state court orally granted summary judgment and ordered a decree of foreclosure.

Upon learning of Cadiz's bankruptcy filing, BONY filed a "Notice of Bankruptcy Petition" in the state court foreclosure action on August 7, 2002. Soon thereafter, the bankruptcy court dismissed Cadiz' s chapter 13 case and set a 240-day bar to a new filing. The bankruptcy court entered a final decree closing the case on October 25, 2002.

On September 29, 2002, BONY filed with the state court a notice of the bankruptcy court's order dismissing the chapter 13 case. BONY then filed an amended notice of hearing on its motion for summary judgment, which it subsequently withdrew.

On March 7, 2003, BONY filed a motion to reopen the bankruptcy case. The bankruptcy court ordered the case reopened on March 11, 2003. On March 12, 2003, BONY filed a motion to annul the automatic stay and co-debtor stay. The bankruptcy court granted the motion to annul on June 3, 2003. In ruling on the motion, the bankruptcy court reasoned that,

> this is, I think, one of the most flagrant examples of a bad faith bankruptcy I've seen or heard of. It's the ninth bankruptcy case filed by the debtor and co-debtors. There was no indication the debtor actually intended to go through with this bankruptcy. She didn't file schedules, didn't show up at the first meeting of creditors. All the indications are that she filed only to get the advantage of the automatic stay. And I don't think the debtor should get any benefit at all from, what is to me, obviously a bad faith filing.

This appeal ensured.

JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. §§ 1334 and 157 (b) (1). We have jurisdiction under U.S.C. § 158 (a) (1).

ISSUE

Whether the bankruptcy court abused its discretion when it issued an order annulling an automatic stay.

STANDARD OF REVIEW

The bankruptcy court decision to annul an automatic stay is reviewed for an abuse of discretion. Nat'l Envtl. Waste Corp. City of Riverside (In re Nat'l Envtl. Waste Corp.), 129 F.1052, 1055 (9th Cir. 1997); Fjeldsted v. Lien (In re Fjeldsted), 293 B.R 12, 18 (9th Cir. BAP 2003).

DISCUSSION

The bankruptcy court found that Cadiz filed the instant bankruptcy petition "only to get the advantage of the automatic stay" and that the filing was "one of the most flagrant examples of a bad faith bankruptcy" that it had ever encountered.

A bankruptcy court has the authority to annul an automatic stay "for cause" under 11 U.S.C. §362 (d). This authority gives the bankruptcy court "wide latitude in crafting relief from the automatic stay[.]" Fjeldsted, 293 B.R. at 21 (quoting Schwartz v. United States (In re Schwartz), 954 F.2d 569, 572 (9th Cir. 1992)). The standard for determining "cause" to annul the automatic stay retroactively is a "balancing of the equities" test that is to be applied on a "case by case" basis. Fjeldsted, 293 B.R. at 23-24; Stinson v. BiRite Restaurant Supply, Inc. (In re Stinson), 295 BR. 109, 116 (9th Cir. BAP 2003). We also made clear in Fjeldsted that its analysis does not require that there be "extraordinary circumstances." Fjeldsted, 293 B.R. at 21-24.

Appellant argues that the bankruptcy court did not expressly invoke Fjeldsted (which was decided one month

earlier) and mechanistically proceed through the factors.

The main fallacy in appellant's argument is that, although we enumerated several factors in Fjeldsted that may be considered to aid the court in weighing the equities of a case, we took care to make clear that a mechanistic application of these factors is inappropriate. Id at 24. The factors are "merely a framework for analysis and not a scorecard" because "one factor may so outweigh the other as to be dispositive." Id. at 25.

As we explained in Fjeldsted,

> [t]he general trend had been to focus on two factors in determining whether cause exists to annul the stay: '(1) whether the creditor was aware of the bankruptcy petition; and (2) whether the debtor engaged in unreasonable or inequitable conduct, or prejudice would result to the creditor.' See Nat'l Envtl. Waste Corp., 129 F.3d at 1055. These two factors are not dispositive. In addition, courts employ many other factors, which further examine the debtor and creditor's good faith, the prejudice to the parties, and the judicial or practical efficacy of annulling the stay.

Id. at 24-25

Appellant's argument disregards this explanation. What is important is not that Fjeldsted be mechanistically applied. Rather, it is that the analysis be consistent with Fjeldsted and reflect a sound exercise of judicial discretion. We are persuaded that occurred in this instance. Here, when Cadiz filed the instant bankruptcy petition, the clerk's office gave her a document entitled "Order Requiring Notice of Bankruptcy Petition to Other Courts." This order required Cadiz to give notice of her bankruptcy filing "to any federal or state court in which the debtor is a party to pending litigation or other proceeding." More specifically, Cadiz was required to give notice, at the earliest possible date, to the

"judge to whom the matter is assigned, the clerk of the court where the matter is pending, all counsel of record in the matter, and all parties to the action not represented by counsel." Most important, however, is the order's statement that the effect of not giving notice may "constitute cause for annulment of the stay."

Despite receiving this order, Cadiz did not provide notice of her bankruptcy filing to anyone. She did not file any schedules and did not show up at the meeting of creditors. Had she notified the appropriate parties, the hearing on the motion would have presumably been stayed once again. See Aheong v. Mellon Mortgage Co. (In re Aheong), 276 B.R. 233, 241 n.9 (9th Cir. BAP 2002). Because neither BONY nor the state court had notice, the hearing went on as scheduled.

The bankruptcy court noted that Cadiz and co-debtors had filed bankruptcy petitions in three and a half years, most of which were filed on the eve of or within a few days before a hearing was to be held on the summary judgment motion. In the instant case, there was no indication that Cadiz actually intended to go through with the bankruptcy. The factor of whether the debtor engaged in unreasonable or unequitable conduct weighs heavily in favor of BONY.

Other factors articulated in Fjeldsted that aid in our analysis and weigh heavily in favor of BONY are the number of bankruptcy filings and "whether, in a repeat filing case, the circumstances indicate an intention to delay and hinder creditors." Fjeldsted, 293 B.R. at 25. The bankruptcy court stated that this was "one of the most flagrant examples of a bad faith bankruptcy I've seen or heard of" and that Cadiz should get no "benefit at all from, what is to me, obviously a bad faith filing." This is consistent with the Fjeldsted analysis and reflects the court's view that it is not being presented with a difficult decision.

We agree with the bankruptcy court. Over the past three and half years Cadiz and co-debtors have lived rent free in their Honolulu residence while BONY has been denied mortgage payments. Multiple bankruptcy filings

precluded a hearing on the foreclosure action, Cadiz did not give notice to the state court or BONY of the instant bankruptcy filing, and the bankruptcy court found that Cadiz's actions were done in bad faith. The record supports these findings, which constitute ample "cause" for justifying the annulment of the automatic stay. The bankruptcy court did not err in so finding.

CONCLUSION

The bankruptcy court did not abuse its discretion when it issued an order annulling the automatic stay. Not only did Cadiz not give notice of her bankruptcy filing to the court or BONY, but the court made several factual findings of bad faith on the part of Cadiz and co-debtors that are supported by the record and that are fully consistent with our analysis articulated in Fjeldsted. As the "balancing of the equities" scale weighs heavy favor BONY, the bankruptcy court appropriately annulled the stay. AFFIRMED.

6. Order, Filed July 7, 2006, In The United States Court Of Appeals For The Ninth Circuit

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re:	) No. 04-15974
	) BAP No. HI-03-1322-KMoS
FLORA B. CADIZ,	)
	) ORDER*
Debtor.	)
	)
	)
FLORA B. CADIZ,	)
	)
Appellant,	)
	)
v.	)
THE BANK OF NEW YORK,	)

Trustee, of Amresco Residential Mortgage Securities Corporation Mortgage Loan Trust 1997-3,

Appellee.

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Smith, Marlar [sic], and Klein, Bankruptcy Judges, Presiding
Argued and Submitted June 16, 2006
Honolulu, Hawaii

Before: B. Fletcher, Pregerson, and Hall, Circuit Judges.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

We affirm the decision to retroactively annul the automatic stay in Cadiz's Chapter 13 bankruptcy proceedings. The bankruptcy court had jurisdiction to reopen the proceedings and consider the motion to retroactively annul the stay because the court was not granting new relief, but rather was simply interpreting and effectuating its prior order. See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379-80 (1994); *see also In re Taylor*, 884 F.2d 478, 481 (9th Cir. 1989).

The bankruptcy court did not abuse its discretion in retroactively annulling the stay. See *In re Nat'l Envtl. Waste Corp.*, 129 F.3d 1052, 1055 (9th Cir. 1997). The Bank of New York did not know of Cadiz's bankruptcy filing at the time of the foreclosure hearing, and her multiple bankruptcy filings indicate inequitable conduct on her part. *Id.*

AFFIRMED.

7. Order, Filed September 13, 2006, In The United States Court Of Appeals For The Ninth Circuit

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re:	) No. 04-15974
	) BAP No. HI-03-1322-KMoS
FLORA B. CADIZ,	) District of Hawaii,
	) Honolulu
Debtor.	)
	) ORDER
FLORA B. CADIZ,	)
Appellant,	)
v.	)
THE BANK OF NEW YORK, Trustee, of Amresco Residential Mortgage Securities Corporation Mortgage Loan Trust 1997-3,	)
Appellee.	)

Before: B. FLETCHER, PREGERSON, and HALL, Circuit Judges.

The panel has voted to deny appellant's petition for panel rehearing and has recommended denial of the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

SUPREME COURT, U.S.
FILED
FEB 15 2007
OFFICE OF THE CLERK

(2)

No. 06-831

IN THE

Supreme Court of the United States

FLORA B. CADIZ,
Petitioner,

v.

THE BANK OF NEW YORK, TRUSTEE OF AMRESCO RESIDENTIAL MORTGAGE SECURITIES CORPORATION MORTGAGE LOAN TRUST 1997-3,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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Rule 29.6 Corporate Disclosure Statement

The Bank of New York, Trustee of Amresco Residential Mortgage Securities Corporation Mortgage Loan Trust 1997-3, is a wholly owned subsidiary of The Bank of New York Company, Inc., a publicly traded company.

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BRIEF OF RESPONDENT IN OPPOSITION

Petitioner Flora B. Cadiz rests her case for review on an asserted conflict between panels of the Ninth Circuit Court of Appeals. There is no such conflict and, even if there were, it would not provide a basis for this Court to grant review. The opinion below is in full accord with the settled precedents of both the Ninth Circuit and this Court. Bankruptcy courts routinely reopen closed cases for the purpose of amending or annulling the automatic stay. The straightforward application of Sections 350 and 362 of the Bankruptcy Code generates no conflict among the Circuits. Certiorari should be denied.

STATEMENT OF THE CASE

1. Respondent Bank of New York is the holder of a mortgage note secured by Petitioner's residence, described as 94-276 Pupukoae Street, Waipahu, Hawaii, 96797. Pet. App. 3. On October 22, 1998, Respondent filed a foreclosure action against Petitioner in state court after Petitioner defaulted on the terms of her note. Respondent subsequently moved for summary judgment and an interlocutory decree of foreclosure. A few days before the foreclosure hearing, Petitioner filed a voluntary petition under Chapter 13 of the Bankruptcy Code which automatically stayed the hearing on Respondent's motion. Pet. App. 11; 11 U.S.C. § 362(a). The bankruptcy court entered a discharge on May 25, 1999. Pet. App. 9. Petitioner filed a second voluntary bankruptcy petition on December 11, 2000, which the bankruptcy court dismissed on February 1, 2001. Pet. App. 10.

2. On July 15, 2002, Petitioner filed a third voluntary bankruptcy petition, again to prevent a state court foreclosure action brought by Respondent scheduled for July 17, 2002. Pet. Br. 1. The petition listed Respondent as the sole creditor

of the estate. Petitioner failed to notify Respondent or the state court of the petition and did not appear at the meeting of creditors. Pet. App. 9. Likewise, Petitioner neither opposed Respondent's motion for summary judgment nor appeared at the July 17, 2002 hearing. The state court, unaware of Petitioner's bankruptcy petition, granted Respondent's motion for summary judgment and ordered a decree of foreclosure against Petitioner's property.

3. On August 7, 2002, Respondent filed a Notice of Bankruptcy Petition with the state court after learning of Petitioner's bankruptcy filing. The bankruptcy court dismissed Petitioner's bankruptcy petition on September 23, 2002 and set a 240-bar to any new filings. The court entered a final decree closing the case on October 25, 2002.

4. On March 11, 2003, the bankruptcy court granted Respondent's request to reopen the underlying bankruptcy proceeding for the limited purpose of considering Respondent's motion to annul the automatic stay. Pet. App. 1. On June 3, 2003, the court granted Respondent's motion to annul the automatic stay which had the effect of curing any technical violation of the automatic stay under Section 362(a) caused by the post-petition foreclosure action. As grounds for its decision, the bankruptcy court described Petitioner's serial bankruptcy filings as "one of the most flagrant examples of bad faith bankruptcy filing I've seen or heard of . . . filed only to get the advantage of the automatic stay." Pet. App. 12.

5. On appeal, Petitioner argued the bankruptcy court had abused its discretion in concluding that "cause" existed under 11 U.S.C. § 362(d) to retroactively annul the automatic stay. The United States Bankruptcy Appellate Panel of the Ninth Circuit disagreed, reasoning that the equities of the case supported the relief granted. Pet. App. 13 (citing *Fjeldsted v. Lien (In re Fjeldsted)*, 293 B.R. 12, 23-24 (9th

Cir. BAP 2003)). Specifically, the Appellate Panel noted the court had ordered Petitioner to give notice of the bankruptcy filing to "any federal or state court in which the debtor is a party to pending litigation or other proceeding" and warned that failure to provide that notice may "constitute cause for the annulment of the stay." Pet. App. 14-15. In light of Petitioner's failure to provide the required notice and her multiple "bad faith" bankruptcy filings, the Bankruptcy Appellate Panel concluded that the bankruptcy court acted within its discretion and affirmed the order annulling the automatic stay. Pet. App. 15-16.

6. The Ninth Circuit Court of Appeals concluded that the bankruptcy court had jurisdiction to reopen the proceedings, reasoning that "the court was not granting new relief, but rather was simply interpreting and effectuating its prior order." Pet. App. 17 (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379-80 (1994); *Tasafaroff v. Taylor (In re Taylor)*, 884 F.2d 478, 481 (9th Cir. 1989)). Likewise, the Ninth Circuit found no abuse of discretion by the bankruptcy court in retroactively annulling the automatic stay because the Bank of New York had no knowledge of Petitioner's bankruptcy filing at the time of the foreclosure hearing and because Petitioner's multiple bankruptcy filings amounted to "inequitable conduct." Pet. App. 17.

7. On September 13, 2006, the Ninth Circuit Court of Appeals denied Petitioner's petition for panel rehearing and rehearing en banc. This petition was filed on December 12, 2006.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND ANY DECISION BY ANY OTHER COURT OF APPEALS.

Petitioner's argument for certiorari rests on a fictitious conflict within the Ninth Circuit Court of Appeals regarding whether Section 350(b) of the Bankruptcy Code permits the reopening of a bankruptcy case that has been dismissed but not closed. Petitioner's argument proceeds from an incorrect assumption. As the record makes clear, the underlying bankruptcy case was dismissed on September 23, 2002 and closed on October 25, 2002. Pet. App. 12. Thus, whether or not Section 350(b) permits a bankruptcy court to reopen a dismissed case is simply not at issue.[1] On the narrow question of whether Section 350(b) permits a closed bankruptcy case to be reopened for the limited purpose of annulling the automatic stay, there is no conflict either within the Ninth Circuit or among the Circuits.

Section 350(b) of the Bankruptcy Code provides bankruptcy courts authority to reopen a closed bankruptcy proceeding "to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b). While not specifically defined in the Code, the decision to reopen a case for "other cause" is discretionary with the bankruptcy court. *See, e.g., In re Shondel*, 950 F.2d 1301, 1304 (7th Cir. 1991); *Apex Oil Co., Inc. v. Spark (In re Apex Oil Co., Inc.)*, 406 F.3d 538, 542 (8th Cir. 2005); *Citizens Bank & Trust Co. v.*

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[1] In any event, the Ninth Circuit has made clear that Section 105(a) of the Bankruptcy Code provides bankruptcy courts broad authority to retroactively annul the automatic stay in dismissed cases, and need not "reopen" a case in such circumstances. *See In Re Castillo*, 297 F.3d 940, 944 (9th Cir. 2002); 11 U.S.C. § 105(a) (a bankruptcy court may issue "any order, process or judgment that is necessary or appropriate to carry out the provisions of this title").

Case (In re Case), 937 F.2d 1014, 1018 (5th Cir. 1991); *Zinchiak v. CIT Small Bus. Lending Corp.* (*In re Zinchiak*), 406 F.3d 214, 224 (3d Cir. 2005); *see also* 3 Collier On Bankruptcy § 350.03[5] ("Because section 350(b) gives the bankruptcy court broad discretion in deciding whether to reopen the case, the decision to grant or deny a motion to reopen is binding on review absent a clearing showing that there was an abuse of discretion."). Panels of the Ninth Circuit likewise have endorsed this interpretation.[2] *See, e.g., Curry v. Castillo (In re Curry)*, 297 F.3d 940 (9th Cir. 2002) ("A bankruptcy court's decision to reopen is entirely within its sound discretion, based upon the circumstances of each case.") (citation omitted); *Elias v. United States Trustee (In re Elias)*, 188 F.3d 1160, 1161 (9th Cir. 1999) (same). In short, the authority of the bankruptcy court to reopen closed cases for "cause" is well-established. Petitioner identifies no conflict on this straightforward application of the Bankruptcy Code and none exists.

It is also clear that, once reopened, the bankruptcy court retains broad discretion to retroactively annul the automatic stay. Specifically, Section 362(d) provides that: "On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay." 11 U.S.C. § 362(d). While uniformly recognizing the bankruptcy court's authority to grant

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[2] While not relevant for purposes of this petition, *see* Sup. Ct. R. 10(a), there is no merit to Petitioner's contention that the decision below amounts to a *sub silentio* overruling of *Income Property Builders, Inc. v. Lomas & Mettleton Co.*, 699 F.2d 963 (9th Cir. 1982). Pet. 7. That decision simply affirmed the dismissal of an appeal to the Bankruptcy Appellate Panel as moot, where a creditor failed to move to vacate the dismissal of the bankruptcy proceeding within the one year period prescribed by Bankruptcy Rule 924. *Id.* at 965. It had nothing to do with the bankruptcy court's authority to reopen closed cases pursuant to Section 350(b), which is firmly established in the Ninth Circuit.

such relief, the Circuits have differed over whether post-petition actions taken in violation of the Section 362 automatic stay are properly considered "void" or "voidable." On the one hand, the Fifth, Sixth and Federal Circuits have characterized post-petition proceedings taken in violation of the automatic stay as "voidable," and therefore capable of being validated *ex post* through retroactive annulment of the stay. *See, e.g., Jones v. Garcia (In re Jones)*, 63 F.3d 411, 412 & n.3 (5th Cir. 1995); *Bronson v. United States*, 46 F.3d 1573, 1578-79 (Fed. Cir. 1995); *Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 911 (6th Cir. 1993). On the other hand, the First, Second, Third, Ninth, Tenth and Eleventh Circuits have described such post-petition proceedings as "void." *See, e.g., In re Siciliano*, 13 F.3d 748, 751 (3d Cir. 1994); *Schwartz v. United States (In re Schwartz)*, 954 F.2d 569, 571 (9th Cir. 1992); *Job v. Calder*, 907 F.2d 953, 956 (10th Cir. 1990) (per curiam); *48th St. Steakhouse, Inc. v. Rockefeller Group, Inc. 48th St. Steakhouse, Inc. v. Rockefeller Group, Inc. (In re 48th St. Steakhouse, Inc.)*, 835 F.2d 427, 431 (2d Cir. 1987); *Albany Partners, Ltd. v. Westbrook (In re Albany Partners, Ltd.)*, 749 F.2d 670, 675 (11th Cir. 1984); *Soares v. Prockton Credit Union (In re Soares)*, 107 F.3d 969, 974 (1st Cir. 1997). Distinguishing between "void" and "voidable" violations of the stay shifts the burden of assessing the validity of a post-petition action from the debtor to the creditor. As the First Circuit explained: "Treating an action taken in contravention of the automatic stay as void places the burden of validating the action after the fact squarely on the shoulders of the offending creditor. In contrast, treating an action taken in contravention of the automatic stay as voidable place the burden of challenging the action on the offended debtor." *Id.* at 974.

As a practical matter, however, even courts characterizing post-petition actions in violation of the automatic stay as "void" have concluded that equitable considerations, such as

the bad faith conduct by the debtor, may provide sufficient grounds for granting relief from the stay. *See, e.g., Albany Partners, Ltd.*, 749 F.2d at 675 (affirming retroactive annulment to validate creditor's foreclosure action where debtor did not file petition in good faith); *Siciliano*, 13 F.3d 748 (annulment of automatic stay may operate to rehabilitate actions taken in violation of automatic stay); *Calder*, 907 F.2d at 956 ("[C]ourts will apply equitable considerations at least where the creditor was without actual knowledge of a bankruptcy petition and the bankrupt's unreasonable behavior contributed to the bankrupt's plight.").

Moreover, the plain language of Section 362 provides the bankruptcy court authority to retroactively annul the automatic stay, thus rendering any distinction between "void" and "voidable" post-petition actions all but irrelevant. Section 362(d) contemplates that a bankruptcy court may grant "relief from the stay" by "annulling, modifying, or conditioning such stay." 11 U.S.C. § 362(d). As commentators have noted, "the use of the word 'annulling' [in § 362(d)] permits the [court's] order to operate retroactively, thus validating actions taken by a party at a time when he was unaware of the stay. Such actions would otherwise be void." 2 Collier On Bankruptcy § 362.07. As such, "[]f a creditor obtains retroactive relief under section 362(d) there is no violation of the automatic stay, and whether violations of the stay are void or voidable is not at issue." *Schwartz*, 954 F.2d at 573.

In short, there is no conflict, either within the Ninth Circuit or among the Circuits, on the application of Sections 350 and 362 of the Bankruptcy Code. Section 350 contemplates that a bankruptcy court may reopen proceedings which have been previously closed. That discretion is consistent with the broad grant of authority found in Bankruptcy Code Section 105(a) which permits the bankruptcy court to issue "any order, process or judgment that is necessary or appropriate to

carry out the provisions of this title." 11 U.S.C. § 105(a). And Section 362(d) allows the court to retroactively annul the automatic stay based on the equities of the case. The decision below does not conflict with decisions from any other Circuit on that interpretation of Sections 350 or 362.

II. NOTHING ABOUT THIS CASE WARRANTS CERTIORARI REVIEW.

Petitioner has advanced no valid reason for the Court to grant review in this case. The petition rests exclusively on a fictitious conflict between the decision below and other decisions with the Ninth Circuit. There is no mention of any conflict with any other Circuit, and none exists.

Nor should this Court be swayed by the alarmist claims catalogued at the end of the petition. Reopening bankruptcy cases for the limited purposes of retroactively annulling the automatic stay does not constitute an "intrusion on the separation of powers between Congress and the Courts." Pet. 9. As discussed, Sections 350(b) and 362(d) of the Bankruptcy Code expressly authorize precisely that form of relief and courts routinely provide such relief without question or conflict. This case involves a narrow question regarding the scope of the bankruptcy court's authority to reopen and retroactively amend prior decisions for "cause." In the many instances in which it has arisen, the issue has proved entirely unexceptional, generating no controversy or conflict among the courts of appeals. There is no reason for this Court to review an issue on which the Circuits are in broad agreement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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